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NO. 81-89

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WALTER ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,
Petitioner,

v.

ALPHA OTIS O'DANIEL STEPHENS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

When a jury in a capital case has imposed a death penalty after finding two or more statutory aggravating circumstances to exist beyond a reasonable doubt, all of which are based upon evidence properly before the jury, should the death penalty be vacated because one of the statutory aggravating circumstances is later set aside?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	6
ARGUMENT AND CITATION OF AUTHORITY	7
I. WHEN A JURY IN A CAPITAL CASE HAS IMPOSED A DEATH PENALTY AFTER FINDING TWO OR MORE STATUTORY AGGRAVATING CIRCUMSTANCES TO EXIST BEYOND A REASONABLE DOUBT, ALL OF WHICH ARE BASED UPON EVIDENCE PROPERLY BEFORE THE JURY, THE DEATH PENALTY SHOULD NOT BE VACATED BECAUSE ONE OF THE STATUTORY CIRCUMSTANCES IS LATER SET ASIDE	7
CONCLUSION	14
CERTIFICATE OF SERVICE	15

TABLE OF AUTHORITIES

Page

Cases Cited

Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976).. 5

Bachellar v. Maryland, 397 U.S. 564 (1970)..... 10

Brooks v. State, 246 Ga. 262, 271 S.E.2d 172 (1980), *cert. denied*, ___ U.S. ___ (1981)..... 8

Burger v. State, 245 Ga. 458, 265 S.E.2d 796, *cert. denied*, 446 U.S. 988 (1980)..... 8

Collins v. State, 246 Ga. 261, 271 S.E.2d 352 (1980), *cert. denied*, ___ U.S. ___ (1981)..... 8

Dampier v. State, 245 Ga. 427, n.1, 265 S.E.2d 565, *cert. denied*, 449 U.S. 938 (1980)..... 8

Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979), *cert. denied*, 445 U.S. 938 (1980)..... 8

Godfrey v. Georgia, 446 U.S. 420 (1980)..... 9

Gregg v. Georgia, 428 U.S. 153 (1976).....7, 8

Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92, *cert. denied*, 439 U.S. 991 (1978).....5, 8, 11

Stephens v. State, 237 Ga. 259, 227 S.E.2d 261 (1976), *cert. denied*, 429 U.S. 986 (1977).....4, 8

Stephens v. Zant, Case No. 79-30-MAC (M.D. Ga., May 11, 1979).....1, 2, 5

Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980).....1, 2, 5, 9, 10

Stephens v. Zant, 648 F.2d 446 (5th Cir. 1981).....1, 2, 5, 12

Stevens v. State, 247 Ga. 698, 278 S.E.2d 398 (1981).. 8

Stromberg v. California, 283 U.S. 359 (1931).....9, 10

Westbrook v. Balkcom, 449 U.S. 999 (1980)..... 9

TABLE OF AUTHORITIES—Continued

Page

Statutes Cited

Ga. Code Ann. § 27-2503(a) 11
Ga. Code Ann. § 27-2503(b) 11
Ga. Code Ann. § 27-2534.1(b)(1) 4, 7
Ga. Code Ann. § 27-2534.1(b)(2) 8
Ga. Code Ann. § 27-2534.1(b)(9) 4
28 U.S.C. § 1253(1) 2
28 U.S.C. § 2254(a) 2

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BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 631 F.2d 397. A copy of the opinion is set forth in the Joint Appendix at J.A. 74. The amended opinion of the Court of Appeals for the Fifth Circuit is reported at 648 F.2d 446. A copy of the opinion is set forth in the Joint Appendix at J.A. 95. The opinion of the District Court dismissing the writ of habeas corpus is an unreported decision. *See Stephens v. Zant,* Case No.

79-30-MAC (M.D. Ga. May 11, 1979). A copy of that opinion is set forth in the Joint Appendix at J.A. 67.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered November 26, 1980. *Stephens v. Zant*, 631 F.2d 397 (5th Cir. 1980). A timely petition for rehearing and rehearing en banc was filed, and the Fifth Circuit entered judgment June 18, 1981, amending the original opinion and denying the petition for rehearing. *Stephens v. Zant*, 648 F.2d 446 (5th Cir. 1981).

The petition for a writ of certiorari was timely filed and granted by this Court October 5, 1981. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Section I, Fourteenth Amendment to the Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES STATUTES

28 U.S.C. § 2254(a):

. . . [A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws . . . of the United States.

STATEMENT OF THE CASE

Respondent Alpha Otis O'Daniel Stephens was tried January 20 and 21, 1975, in the Superior Court of Bleckley County, Georgia, for the murder of Roy Asbell. The evidence before the jury, amply recounted in the opinion of the Supreme Court of Georgia (J.A. 39), was that Stephens escaped from the Houston County, Georgia, jail and, accompanied by another man, went to the home of Charles Asbell in Twiggs County, Georgia. Stephens broke into the Asbell home and stole a number of weapons, including a .357 magnum pistol, which he loaded, and all of which he placed in a 1972 Dodge.

Roy Asbell, Charles Asbell's father, drove up to his son's house and discovered the burglary in process. When he confronted Stephens, Stephens ran to Asbell's car, jerked Asbell from the car, and hit him in the face several times.

> . . . Asbell begged not to be hit anymore. Stephens is 6 feet, 2 inches tall, while Asbell was 5 feet, 6 inches, and at that time Asbell was crippled as the result of a tractor accident. Asbell usually carried several hundred dollars on his person, and when he offered Stephens money in exchange for his life, Stephens took the offered money and kicked Asbell again.
>
> Stephens hit Asbell with a pistol, knocking him back into the Ranchero and told his alleged partner to kill him if he moved. They drove approximately three miles to a pasture, where they stopped and Asbell got out of the car and tried to escape. He hobbled to an abandoned building being used as a barn, but Stephens took the .357 magnum and ran after him. He took more money from Mr. Asbell and then placed the pistol in his ear and fired twice. Both bullets passed through Asbell's skull and exited at his right temple, causing his death. An autopsy showed that

> he sustained a broken jaw and several skull fractures. A trail of evidence connected Stephens to the crime. In pretrial statements to the police, he confessed this crime fully, as well as a string of other serious crimes which he committed after his escape and before the Asbell murder. He presented no defense at trial. During the hearing on sentence, however, he testified that his partner fired the fatal shots.

Stephens v. State, 237 Ga. 259, 259-60, 227 S.E.2d 261 (1976), *cert. denied*, 429 U.S. 986 (1977). (J.A. 39-40). Based upon this and other evidence, the jury found Stephens guilty.

During the sentencing phase of the trial, Stephens' prior convictions for motor vehicle theft, six counts of burglary, three counts of armed robbery, kidnapping with bodily injury, and murder were introduced into evidence.

The jury found three aggravating circumstances authorizing them to consider imposing the death penalty:

(1) the offense of murder was committed by a person with a prior record of conviction for a capital felony, Ga. Code Ann. § 27-2534.1(b)(1);

(2) the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions, Ga. Code Ann. § 27-2534.1(b)(1); and

(3) the offense of murder was committed by a person who has escaped from the lawful custody of a peace officer and place of lawful confinement, Ga. Code Ann. § 27-2534.1(b)(9).

After Stephens was tried but before his appeal was final, the Supreme Court of Georgia held that the portion of Ga. Code Ann. § 27-2534.1(b)(1) which allows the death penalty to be imposed when a murder is "committed by a person who has a substantial history of

serious assaultive criminal convictions" is unconstitutional. *Arnold v. State*, 236 Ga. 534, 542, 224 S.E.2d 386 (1976). Nevertheless, the Supreme Court of Georgia upheld Stephens' death penalty because the evidence supported the jury's findings of the other two aggravating circumstances. 237 Ga. at 261-62.

On appeal from the denial of state habeas corpus relief, the Supreme Court of Georgia again held that the jury properly was allowed to consider evidence adduced in support of the statutory aggravating circumstance later held to be unconstitutional; the setting aside of the aggravating circumstance did not require vacating the death penalty. *Stephens v. Hopper*, 241 Ga. 596, 603-04, 247 S.E.2d 92, *cert. denied*, 439 U.S. 991 (1978). In its consideration of the death penalty on direct appeal, the Supreme Court of Georgia had found that "the evidence supports the jury's findings of the other statutory aggravating circumstances, and consequently the sentence is not impaired." 237 Ga. at 262.

The United States District Court for the Middle District of Georgia denied federal habeas corpus relief. *Stephens v. Zant*, Case No. 79-30-MAC (M.D. Ga., May 11, 1979). However, on appeal to the United States Court of Appeals for the Fifth Circuit, the death penalty was vacated. *Stephens v. Zant*, 631 F.2d 397 (5th Cir. 1980). Upon Warden Zant's timely petition for rehearing and rehearing en banc, the Fifth Circuit changed one paragraph of the prior opinion but denied the petition for rehearing and for rehearing en banc. *Stephens v. Zant*, 648 F.2d 446 (5th Cir. 1981).

SUMMARY OF THE ARGUMENT

Georgia law requires at least one statutory aggravating circumstance to be found by the jury before the jury can consider imposition of the death penalty. In the present case, the jury specified three statutory aggravating circumstances and, based upon all the aggravating and mitigating evidence before it, recommended a sentence of death.

Thereafter, one of the three circumstances specified by the jury was held unconstitutional by the Supreme Court of Georgia; however, the evidence introduced at trial in support of that aggravating circumstance, Stephens' prior convictions and sentences, was admissible and properly considered by the jury. The invalidation of the statutory aggravating circumstance had no effect whatsoever upon the evidence before the jury.

The Fifth Circuit erred in determining the jury's verdict was a general one because it plainly was not; the trial jury specified those statutory aggravating circumstances which it found supported by the evidence and which authorized it to consider imposition of a sentence of death. The Fifth Circuit further erred in finding that the trial court's instruction on the statutory aggravating circumstance later set aside may have unduly influenced the jury's deliberation and verdict because the evidence upon which it was based was admissible and properly before the jury for its consideration.

Because the invalidation of one statutory aggravating circumstance removed no evidence whatsoever from the jury's consideration, because as even the Fifth Circuit recognized there was no uncertainty that either of the two remaining aggravating circumstances would be legally sufficient to permit the jury to impose the death penalty,

and because Georgia law permits the jury to consider imposition of a death penalty upon a finding of one statutory aggravating circumstance, the decision below vacating the death penalty is wrong.

ARGUMENT AND CITATION OF AUTHORITY

I. WHEN A JURY IN A CAPITAL CASE HAS IMPOSED A DEATH PENALTY AFTER FINDING TWO OR MORE STATUTORY AGGRAVATING CIRCUMSTANCES TO EXIST BEYOND A REASONABLE DOUBT, ALL OF WHICH ARE BASED UPON EVIDENCE PROPERLY BEFORE THE JURY, THE DEATH PENALTY SHOULD NOT BE VACATED BECAUSE ONE OF THE STATUTORY CIRCUMSTANCES IS LATER SET ASIDE.

The issue presented for this Court's consideration is concise: When the evidence presented to a jury is more than sufficient to warrant imposition of a death penalty, should the death penalty be vacated because one of three statutory aggravating circumstances supported by admissible evidence and found to exist by the jury is later set aside?

This Court is familiar with Georgia's death penalty statute and the sentencing procedure set forth therein. Ga. Code Ann. § 27-2534.1(b) provides that "[i]n all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law" and any of ten specified "statutory aggravating circumstances which may be supported by the evidence. . . ." As this Court recognized in its initial review of Georgia's death penalty statute in *Gregg v. Georgia*, 428 U.S. 153, 197 (1976), the finding by a jury of

a statutory aggravating circumstance is a prerequisite to consideration of imposition of a sentence of death; it is not tantamount to imposing the death penalty.

The law in Georgia is well-settled that if a death penalty is imposed following the finding of two or more statutory aggravating circumstances, each of which has been established beyond a reasonable doubt, the death penalty will not be vacated because one of the statutory aggravating circumstances is set aside. *See, e.g., Stevens v. State*, 247 Ga. 698, 278 S.E.2d 398 (1981); *Hamilton v. State*, 246 Ga. 264, n. 1, 271 S.E.2d 173 (1980), *cert. denied*, ___ U.S. ___, *reh. denied*, ___ U.S. ___ (1981); *Brooks v. State*, 246 Ga. 262, 263, 271 S.E.2d 172 (1980), *cert. denied*, ___ U.S. ___ (1981); *Collins v. State*, 246 Ga. 261, 262, 271 S.E.2d 352 (1980), *cert. denied*, ___ U.S. ___ (1981); *Burger v. State*, 245 Ga. 458, 460-461, 265 S.E.2d 796, *cert. denied*, 446 U.S. 988 (1980); *Dampier v. State*, 245 Ga. 427, 883, n. 1, 265 S.E.2d 565, *cert. denied*, 449 U.S. 938 (1980); *Gates v. State*, 244 Ga. 587, 599, 261 S.E.2d 349 (1979), *cert. denied*, 445 U.S. 938 (1980); *Stephens v. Hopper*, 241 Ga. 596, 603-04, 247 S.E.2d 92, *cert. denied*, 439 U.S. 991 (1978); *Stephens v. State*, 237 Ga. 259, 261-62, 227 S.E.2d 261 (1976), *cert. denied*, 429 U.S. 986 (1977).

Although the precise question presented has not been directly decided by this Court, cases involving similar circumstances have been before the Court. For example, in *Gregg v. Georgia, supra*, the death penalty imposed for murder was upheld even though the death penalty for armed robbery had been set aside by the Supreme Court of Georgia. One of the aggravating circumstances on which the death penalty for murder was based was that it occurred during the commission of another capital felony, armed robbery. Ga. Code Ann. § 27-2534.1(b)(2).

In *Westbrook v. Balkcom*, 449 U.S. 999 (1980), Mr. Justice Stevens, concurring in the denial of certiorari, noted that

> the Supreme Court of Georgia, in cases remanded by this Court for further consideration in light of [*Godfrey v. Georgia*, 446 U.S. 420 (1980)], decided to adhere to its prior position that a death penalty imposed on the basis of a plurality of aggravating circumstances, each of which has been established by proof beyond a reasonable doubt, will not be set aside simply because one of those aggravating circumstances is vulnerable. . . . Because the Georgia Supreme Court's position is clear, and because I consider it consistent with this Court's decisions, I think the Court has correctly decided to deny certiorari in this case. . . .

Id. (Stevens, J., concurring).

In its original opinion vacating the death penalty, the United States Court of Appeals for the Fifth Circuit, relying primarily on the authority of *Stromberg v. California*, 283 U.S. 359 (1931), found that it was impossible for the Fifth Circuit, as a reviewing court, "to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance." *Stephens v. Zant*, 631 F.2d 397, 406 (5th Cir. 1980). The Court further opined:

> . . . The jury had the authority to return a life sentence even if it found statutory aggravating circumstances. It is possible that even if the jurors believed that the other aggravating circumstances were established, they would not have recommended the death penalty but for the decision that the offense was committed by one having a substantial history of serious assaultive criminal convictions, an invalid ground. The presence of the unconstitutionally vague circumstance also made it possible for the jury to

> consider several prior convictions of petitioner which otherwise would not have been before it. The instruction on the invalid circumstance may have directed the jury's attention to those convictions. It cannot be determined with the degree of certainty required in capital cases that the evidence of those convictions, together with the instruction, did not make a critical difference in the jury's decision to impose the death penalty.

Id. This reasoning of the Fifth Circuit is based upon a misapplication of *Stromberg v. California, supra,* and a misunderstanding of the law of Georgia.

First, in *Stromberg v. California, supra,* this Court was concerned with a trial jury's return of a general verdict of guilty which could have rested upon either of three grounds, one of which was clearly impermissible. Because the verdict returned was a general one, it was impossible to determine whether the jury's verdict rested on the sole unconstitutional ground since the jury had been instructed in the disjunctive. A similar circumstance was addressed in *Bachellar v. Maryland,* 397 U.S. 564 (1970), also relied upon by the court below.

The verdict in the present case, however, is not a general verdict. Three statutory aggravating circumstances were specified in writing by the jury. All were supported by admissible evidence. As even the Fifth Circuit recognized, "there were two other aggravating circumstances, either of which by itself would be legally sufficient to permit the jury to impose the death penalty and as to both of which there is no uncertainty." *Stephens v. Zant,* 631 F.2d 397, 406 (5th Cir. 1980).

Second, the Court of Appeals held that "[t]he presence of the unconstitutionally vague circumstance also made it possible for the jury to consider several prior convictions

of [Stephens] which otherwise would not have been before it." *Id.* This determination by the Court of Appeals was simply incorrect. As the Supreme Court of Georgia had previously ruled on Stephens' appeal from the denial of state habeas corpus relief, even though the statutory aggravating circumstance was later declared invalid the evidence which was admitted to support it was properly before the jury:

> The evidence introduced by the state was the appellant's criminal record. Code Ann. § 27-2503(b) (Ga. L. 1974, pp. 352, 357) provides in part: "In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted in the same manner as presentence hearings conducted before the judge as provided in subsection (a) of this section." Under Code Ann. § 27-2503(a), the record of any prior criminal convictions of the defendant, if made known to the defendant prior to his trial, is admissible. The record of the appellant's prior criminal convictions was, therefore, admissible in the penalty phase of this trial. . . .

Stephens v. Hopper, 241 Ga. 596, 603-04, 247 S.E.2d 92, *cert. denied*, 439 U.S. 991 (1978). Following the Fifth Circuit's misconstruction of Georgia law, Warden Zant petitioned for rehearing and for rehearing en banc, pointing out that well-established Georgia law was clearly contrary to the opinion of the Court of Appeals. The petition was denied; however, the court below modified its previous opinion by deleting the sentence which stated that Stephens' prior convictions were not properly before the jury. The court also modified the sentence which followed, changing it from "may have directed the jury's

attention" to "may have *unduly* directed the jury's attention" to Stephens' prior convictions. *Stephens v. Zant*, 648 F.2d 446 (1981) (emphasis supplied).

Thus, even though the Fifth Circuit clearly indicated the remaining two statutory aggravating circumstances were amply supported by the evidence and properly before the jury, that either would be sufficient to authorize imposition of the death penalty, that the evidence submitted in support of the later invalidated statutory circumstance was also admissible and properly considered by the jury, and even though only one statutory aggravating circumstance need be found under Georgia law to authorize imposition of the death penalty. The court held that the invalidation of one in this case imbued the deliberation and verdict with constitutional error because it "may" have affected the jury, although the court could not tell with "the degree of certainty required in capital cases. . . ." *Id.*

The decision below is wrong, therefore, on two grounds: (1) the verdict returned was not a general one, because the jury listed specific circumstances supported by the evidence which authorized it to consider imposing and impose the death penalty, and (2) the invalidation of one of the three statutory aggravating circumstances had no effect, or no impermissible effect, because the evidence submitted in support of it was admissible evidence which the jury properly was allowed to consider in determining the appropriate punishment to be imposed.

Because only one statutory aggravating circumstance must be found to authorize a jury to consider imposing the death penalty, because even after the setting aside of one statutory aggravating circumstance in this case two remained, and because all the evidence before the jury,

including that supporting the invalid statutory aggravating circumstance, was admissible, the death sentence was authorized and lawfully imposed. The jury's recommendation of death was based not upon the statutory aggravating circumstances but upon all the evidence before the jury in aggravation and mitigation of punishment which had been introduced at both phases of the trial. Absent the removal of some material piece of evidence in aggravation or mitigation of punishment which was considered by the jury, the setting aside of less than all of the statutory aggravating circumstances found by the jury to exist beyond a reasonable doubt works absolutely no effect upon the jury's process of deliberation in reaching their recommendation of appropriate punishment.

CONCLUSION

For the foregoing reasons Petitioner respectfully requests this Court to reverse the decision of the lower court.

Respectfully submitted,

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